

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED

July 25, 2013

In the Matter of BIRDSALL/FOULIS, Minors.

No. 313941  
Oakland Circuit Court  
Family Division  
LC No. 2010-778549-NA

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In the Matter of BIRDSALL/FOULIS, Minors.

No. 314339  
Oakland Circuit Court  
Family Division  
LC No. 2010-778549-NA

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Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

In Docket No. 313941, respondent mother appeals by right the trial court's order terminating her parental rights to the three minor children under MCL 712A.19b(3)(c)(i), (g), and (j). In Docket No. 314339, respondent father appeals by right the trial court's order terminating his parental rights to his minor child under the same statutory grounds. We affirm.

Respondent mother first argues that she did not knowingly, intelligently, or voluntarily waive her right to have a probable cause hearing pursuant to MCR 3.962(B)(3). We disagree. This issue was not preserved for appeal by an objection in the trial court. Therefore, respondent mother must establish that there was plain error that affected her substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999); *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utera*, 281 Mich App at 9.

At the initial preliminary hearing, the children's guardians were the respondents in this proceeding.<sup>1</sup> Petitioner sought to terminate the guardianship after allegations came to light that the male guardian had sexually abused one of the children. Counsel for each of the two guardians agreed to a conditional waiver of probable cause, as the guardians had no objection to termination of their guardianship. At the next hearing, the guardians were dismissed, and respondent mother and father were added as respondents. The only change in the amended petition from the initial petition was the identity of the respondents.<sup>2</sup> No additional allegations were presented, and none of the original allegations were omitted. Respondent mother never challenged the initial waiver of the probable-cause determination and later pleaded no contest to the allegations in the petition.

The trial court was not required to seek waiver from every individual respondent. See *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2001). Further, respondent mother's no contest plea precludes a claim that she did not knowingly waive her right to a probable-cause hearing. See *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). In addition, the same evidence used to support the no contest plea would have been proffered at a probable-cause hearing. Given that probable cause may be established in whatever manner and with whatever information deemed sufficient by the trial court, MCR 3.962(B)(3), it is unlikely that the trial court would have reached a different decision if respondent mother had requested a probable-cause hearing. Thus, respondent mother cannot demonstrate that the outcome would have been different. Finally, jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack in an appeal of an order terminating parental rights. *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005); *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008). To the extent that respondent mother raises a jurisdictional challenge on appeal, her claim of error constitutes a collateral attack and is not properly before this Court.

Next, respondent mother contends that the trial court erred by not investigating the parties' status under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.* We disagree. Under MCR 3.965(B)(2) and the ICWA notice provision, 25 USC 1912(a), the court must inquire if the child or either parent is a member of an Indian tribe and, if so, must determine the identity of the child's tribe and notify the tribe "where the court knows or has reason to know that an Indian child is involved." *In re Morris*, 491 Mich 81, 99-102, 107 n 17; 815 NW2d 62 (2012). In exploring the meaning of "reason to know," the Court held that "sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement" of ICWA. *Id.* at 108. "[W]hen there are sufficient indications that the child may be an Indian child, the ultimate determination requires that the tribe receive notice of

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<sup>1</sup> Respondent mother had placed her children in the guardianship with friends after she experienced financial difficulty taking care of them, leading to involvement by child protective services.

<sup>2</sup> The allegations in the petition included a claim that the child had disclosed the sexual abuse to respondent mother and that she failed to protect her children by continuing to allow contact between her daughters and the accused guardian after being made aware of the sexual abuse.

the child custody proceedings, so that the tribe may advise the court of the child's membership status." *Id.* at 100.

Upon a thorough search of the record, we find no indication that the court knew or had any reason to know that an Indian child was involved in this case. Respondent mother has made no claim on the record that she or respondent father or any of the children has Indian heritage. She has not proffered to this Court any indicia on which tribal membership might be based. Therefore, she has failed to demonstrate any error by the trial court that affected the outcome of this case. See *Carines*, 460 Mich at 762-764. We find no support for a conditional reversal to settle this issue.

Next, respondent mother contends that the court violated the time requirements of MCR 3.972.<sup>3</sup> Because this issue was not preserved for appeal, respondent mother must demonstrate plain error that affected the outcome of the lower-court proceedings. See *id.* at 763. Here, respondent ultimately pleaded no contest to the allegations in the petition.<sup>4</sup> Regardless of whether the court failed to comply with the time requirements of MCR 3.972, the court rule does not provide any sanction for such a violation, and this Court will not add any sanction that the Legislature and the Supreme Court have declined to provide. *In re Kirkwood*, 187 Mich App 542, 545-546; 468 NW2d 280 (1991). Failure to follow the time requirements will not lead to dismissal of a termination order where the court rule or relevant statute does not provide sanctions for their violation. *In re Jackson*, 199 Mich App 22, 28-29; 501 NW2d 182 (1993).

Next, respondent mother argues that the trial court clearly erred by finding clear and convincing evidence to support the statutory grounds for termination. We disagree.

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "We review the trial court's determination for clear error." *Id.* "A finding is 'clearly erroneous' if, although there is evidence to support it, we are

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<sup>3</sup> MCR 3.972(A), provides that "[i]f the child is in placement, the trial [regarding allegations in a petition] must commence as soon as possible, but not later than 63 days after the child is removed from the home," unless the trial is postponed for reasons inapplicable here.

<sup>4</sup> The first amended petition was filed on December 13, 2010. At the pretrial on December 22, 2010, respondent mother stated her intention to plead no contest to the allegations in the amended petition. However, because not all the parties were present, the court adjourned the matter and set it for another pretrial without objection. On February 1, 2011, respondent mother again requested to place her plea of no contest on the record. However, the father of two of the children had not been located or served, and the court stated that "because there might be a problem with the other father, it might be better to wait the 3 weeks or so" for the plea. There was no objection to the delay. On February 24, 2011, the father had been located and requested a trial. No statements were made concerning respondent mother's plea. Respondent mother made no objection to the delay. At the next hearing on May 2, 2011, respondent mother pleaded no contest.

left with a definite and firm conviction that a mistake has been made.” *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). This Court must give due regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

The trial court terminated respondent mother’s parental rights under MCL 712A.19b(3)(c)(i), (g), and (j), which provide as follows:

(3) The court may terminate a parent’s parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:

(i) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child’s age.

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(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child’s age.

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(j) There is a reasonable likelihood, based on the conduct or capacity of the child’s parent, that the child will be harmed if he or she is returned to the home of the parent.

The evidence at the termination hearing amply supported the finding of statutory grounds for termination of respondent mother’s parental rights under MCL 712A.19b(3)(c)(i) and (g).<sup>5</sup> When the children were brought into the court’s jurisdiction, respondent mother had failed to provide a stable and consistent home for them and lacked sufficient income to maintain consistent housing. As the trial court noted, this case was precipitated by respondent mother’s difficulty taking care of the children, which prompted her placing them in a guardianship. While in respondent mother’s care, the eldest child had attended about 16 different schools, and the younger two children had attended about eight. Evidence at the termination hearing established

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<sup>5</sup> Respondent mother points out in her brief that the trial court enunciated its findings with regard to grounds for termination under MCL 712A.19b(3)(c)(i) and (g) but was silent in its oral opinion from the bench regarding (3)(j), even though it was included as a ground in the termination order. Because only one statutory ground is necessary for termination, we need not address whether there was sufficient evidence to establish a statutory ground for termination under MCL 712A.19b(3)(j). *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

that respondent mother's living situation remained unstable. She had lived in six different homes in the last two years. Thus, even though her current residence was found to be appropriate for the children, respondent mother had demonstrated that she could not maintain a residence for more than four months before moving to the next place. The children had serious emotional problems that were exacerbated by the uncertainty of their lives. Although they had been in foster care for two years, respondent mother was still not able to have them placed with her or to maintain a stable home.<sup>6</sup>

Respondent mother contends that she had complied with everything that had been required in the parent/agency agreement and that, because of this, her parental rights should not have been terminated. However, the record demonstrates that respondent mother had not benefited from her participation in services. Participation and compliance with the requirements are not sufficient when the person does not learn from the participation and compliance and does not change one's harmful parenting behaviors and life patterns. *Gazella*, 264 Mich App at 676.

Next, respondent mother contends that the trial court clearly erred by finding that termination of her parental rights was in the best interests of the children. See, generally, MCL 712A.19b(5) ("If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made."). The best-interest "determination is to be made on the basis of the evidence on the whole record and is reviewed for clear error." *In re LE*, 278 Mich App 1, 25; 747 NW2d 883 (2008). Whether termination of parental rights is in the best interests of the children must be proven by a preponderance of the evidence. *In re Moss*, \_\_\_Mich App\_\_\_; \_\_\_NW2d\_\_\_ (Docket No. 311610, issued May 9, 2013), slip op at pp 3-6.

Upon review of the record, we find that the trial court considered the best-interest factors set forth in *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012). The court relied on the facts that (1) the children had been in foster care for over two years and were demonstrating a dire need for permanency, stability, and finality, (2) although they were bonded to their mother, they were even more bonded to each other and they had also bonded to their foster home, (3) the uncertainty and instability of their lives had exacerbated their many mental health issues, (4) respondent mother was not yet financially or emotionally ready and capable of taking care of her three children<sup>7</sup>, all of whom had special needs, and (5) respondent mother was herself in need of intensive counseling but had neither been in substantial compliance with attendance at counseling nor demonstrated a benefit from counseling. Finally, the court considered the observations, findings, and opinions of the experts and specialists who testified and filed reports in this case. We conclude that given the instability in the children's lives and the resultant emotional distress, the court did not err by finding that the children needed stability

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<sup>6</sup> Respondent mother also had serious mental health issues that had not been addressed. Although respondent mother had attended therapy sessions, her mental health issues left her emotionally incapable of caring for the children at the time of the termination hearing.

<sup>7</sup> Given their mother's dependencies, the children took on the role of the adults.

and permanence in their lives that respondent mother could not provide. The bond between respondent mother and the children did not negate the very real possibility that harm could befall them if returned to respondent mother, who was not yet financially or emotionally able to provide proper care or custody for them after over two years in foster care. The trial court did not clearly err by finding that termination of respondent mother's parental rights was in the best interests of the children.

Finally, respondent mother argues that the trial court clearly erred by not separately evaluating whether termination was in the best interests of each individual child. We disagree. It is clear that *Olive/Metts*, 297 Mich App at 42, requires the trial court to view each child individually and also decide the best interests of each child individually. However, this Court did not establish a strict formula or set up defined guidelines to follow other than our referral to the best-interests framework of the Child Custody Act. Upon review of the record, we find that the trial court at every hearing heard evidence about each child individually; the evidence related to each child's needs, behaviors, and progress and included any additional comments from the guardian ad litem, the foster care worker, and any other witness who had information. At the best-interest hearing, testimony was again presented concerning each child individually, and the eldest child testified concerning her needs, thoughts, and wishes. In its decision on best interests, the court made numerous individual findings about each child. The record clearly showed that keeping the children together was in their best interests. The fact that the court summed up the best interests by including all three children does not belie the fact that the court considered each child individually. Therefore, we conclude that there was compliance with *Olive/Metts* and that no error occurred.

In his appeal, respondent father does not contest the statutory grounds for termination. Respondent father only argues that the trial court clearly erred when it determined that termination of his parental rights was in the best interests of his minor child. We disagree.

At the best-interest hearing, respondent father's "liberty interest" no longer included his right to custody and control of his child. See *In re Foster*, 285 Mich App 630, 634-635; 776 NW2d 415 (2009). In fact, at this stage, his interest in the care and custody of his child "yields to the state's interest in the protection of the child." *Id.* at 635; see also *In re Moss*, slip op at 6 ("[A]t the best-interests stage, the child's interest in a normal family home is paramount to any interest the parent has."). As stated above, the trial court reviews the child's best interests using a preponderance of the evidence standard, *In re Moss*, slip op at 6, and we review the trial court's findings for clear error, *In re LE*, 278 Mich App at 25. As we recognized in *Olive/Metts*, 297 Mich App at 42, "in most cases it will be in the best interests of each child to keep brothers and sisters together." At the best-interest hearing, the court may consider the advantages of the foster home over the parent's home. *Id.* at 41-42.

Although respondent father had maintained contact with the minor child most of her life, he never had sole care or custody of her, and he did not expect or position himself to do so until the very end of the proceedings. The situation was further complicated by the fact that respondent father continued to live with his parents for two years during the proceedings even though at least one of the children had accused respondent father's father of sexual abuse. His father was ultimately acquitted of criminal charges at a second trial, but respondent father agreed with the trial court that the children should not be exposed to his father. At the time of the best-

interest hearing, respondent father had finally established a steady income and a suitable home. However, his job as a long-distance truck driver required out-of-state driving. Although he maintained contact with the minor child by telephone when he was out of state, his personal contact had dwindled to about once a month. By the time of the best-interest hearing, respondent father claimed to have a chance for local employment but was waiting to see the outcome of this case before he accepted it. The court noted that two years of pushing and prodding had passed before respondent father had put himself in a position to care for the child. Further, respondent father's plan for his child's care would not only separate her from her siblings but would leave her in after-school programs and in the care of her paternal grandmother, a woman with whom she had no contact for over two years. The trial court acknowledged respondent father's efforts toward reunification and noted the bond between respondent father and the minor child; however, it also noted that the child was bonded to her sisters and to the foster family, who expressed a desire to adopt all three children. Ultimately, the trial court determined that because of the child's age and the fact that she had not been with respondent father for two years, foregoing her chance for adoption along with her siblings and attempting a trial placement with her father at some point would jeopardize her stability and not be in her best interests. Upon review of the entire record, we cannot conclude that the trial court clearly erred by finding that termination of respondent father's parental rights was in the minor child's best interests.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Jane M. Beckering

/s/ Douglas B. Shapiro